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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
TERRENCE O'DONNELL
NICOLE K. SELIGMAN
WILLIAMS & CONNOLLY
839 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

The main thrust of Respondent's Brief in Opposition is that the Petition for a Writ of Certiorari should be denied because in respondent's view petitioner is wrong on the merits. However, respondent cannot seriously take issue either with petitioner's claim that the questions presented are of exceptional importance or with his assertion that the law at issue is hotly debated and plainly unsettled. Whatever its proper disposition on the merits, respondent's analysis is neither uniformly accepted nor clearly correct, and it offers no sound basis for denying this petition for certiorari.

Indeed, the Brief for the United States as Amicus Curiae confirms the need for review of the ruling below by curiously adopting the legal analysis advanced by the separate concurring and dissenting opinion of Judge Williams—with which petitioner in large part agrees—as a basis for denying certiorari.

1. Respondent argues that the petition should be denied because the court of appeals erred in reaching the merits of any of petitioner's arguments. Opp. to Pet. for Cert. at 22. This "ripeness" argument is meritless. The unanimous ruling of the court of appeals that the recipient of a grand jury subpoena who is held in contempt for failure to comply may defend against compliance on the ground that its issuance was without lawful authority, *see* App. 66a-73a, is entirely consistent with the decisions of numerous other courts of appeals, and respondent has not cited a single ruling to the contrary. *See, e.g., In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirlomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975). The D.C. Circuit's decision also is consistent with repeated decisions of this Court recognizing a litigant's right to challenge the lawfulness of exercises of governmental power that are "regulatory, proscriptive, or compulsory in nature." *See Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). The independent counsel's argument—not even advanced by the Solicitor General—exhibits an acute disregard for the right of a citizen to challenge the exercise of coercive governmental power and is unprecedented.[1]

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[1] Respondent's argument that the court of appeals "suggested that the enactment of section 1826 overruled *Blair* v. *United States*, 250 U.S. 273 (1919) . . ." (Opp. to Pet. for Cert. at 22) is entirely untrue. The decision of the court of appeals required no holding that § 1826 overruled *Blair*, and that court certainly made no such suggestion. In fact, the court expressly noted that *Blair* defined one category of impermissible challenges by recipients of subpoenas, but that petitioner presented a wholly different kind of challenge that was not controlled by *Blair*. *See* App. 72a.

In any event, if the court of appeals erred in reaching the merits of the case, the proper course is not to deny certiorari—and thereby to let stand, unreviewed, that court's ruling on issues of exceptional importance—but instead to grant the petition and vacate the ruling below.

Alternatively, the "ripeness" argument advanced by respondent is substantially analogous to one of the issues before this Court in *United States Catholic Conference and National Conference of Cath-*

2. Respondent offers two answers to petitioner's argument that certiorari should be granted to consider the lawfulness of the Attorney General's regulation. First, he argues that this Court already resolved the lawfulness of the Attorney General's regulation in *United States* v. *Nixon*, 418 U.S. 683 (1974). Second, he asserts that under the proper reading of the Appointments Clause of Article II, petitioner is incorrect in arguing that the regulation is unlawful. Both of these responses are wrong, and they serve only to underline the importance of the issues raised in the petition (which respondent nowhere disputes) and the pervasive confusion in this area of the law.

A. A fair reading of *United States* v. *Nixon*, *supra*, establishes that the lawfulness of the regulation appointing the special prosecutor and delegating powers to him was not at issue there. The pages in *Nixon* on which respondent relies, 418 U.S. at 692-97 (*see* Opp. to Cert. Pet. at 12 n.6), straightforwardly analyze the justiciability of the issue presented. The parties in that case took as a given the fact that the "President has delegated certain specific powers to the Special Prosecutor," *id.* at 693, and not surprisingly neither the President nor the Special Prosecutor challenged the President's authority to do so. It would have been peculiar indeed for the President to have defended against a subpoena in that case on the ground that he had acted unlawfully in delegating away his own authority. The assertion that the *Nixon* Court held the controversy to be justiciable "precisely *because* the Attorney General had the authority to delegate such powers" (Opp. to Pet. for Cert. at 12 n.6) is misleading and unsupported by the Court's opinion.

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olic Bishops v. *Abortion Rights Mobilization, Inc., et al.*, No. 87-416. That case raises the issue whether a subpoenaed party in a civil case may challenge the power of the issuing authority to act. Rather than be denied or vacated on the alternate ground offered by respondent—that the questions presented are not properly before this Court at this time—at a minimum this petition should be held for a decision in No. 87-416.

The issue presented in this petition was neither presented to nor resolved by this Court in *United States* v. *Nixon*.

Moreover, the Watergate regulation differed from the Attorney General's regulation here in crucial ways that demonstrate a keen sensitivity in an earlier era to the very issues raised by petitioner. For one, the President, not the Attorney General, delegated the powers at issue in *Nixon*, and the question of the *Attorney General's* authority therefore was not presented. Second, the regulation by its terms expressly recognized that the President has "constitutional powers to effect the discharge of the Special Prosecutor or to limit [his] independence," but noted that the President had assured the Attorney General that he "will not exercise" those powers. *See* 418 U.S. at 694 n.8, quoting 38 Fed. Reg. 30739. The Watergate regulation therefore presented the removal issue in an entirely different posture from the Attorney General's regulation, which recognizes no such inherent right of the Executive to remove the independent counsel or amend his office.

Finally, whereas respondent is not accountable to anyone under the Attorney General's regulation, the Watergate regulation pointedly limited the delegation of authority to the Special Prosecutor by giving him "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice." 38 Fed. Reg. 30739 (quoted in *United States* v. *Nixon*, *supra*, 418 U.S. at 694 n.8).[2] In contrast, the current Attorney General's regulation purports to delegate the Attorney General's full and final authority to the independent counsel without regard to the Attorney General's statutory accountability. It is that very delegation of final authority, which was not at issue

[2] This limitation was no doubt in recognition of 28 U.S.C. § 516, which provides that the Attorney General is responsible for the direction of all litigation in which the United States is interested.

in *Nixon*, that is at issue here. Respondent's analogy to Watergate and his reliance on *United States* v. *Nixon*, *supra*, are therefore wholly misplaced. In fact, the differences between the two regulations highlight the problems with the current regulation. The critical issue presented remains unresolved by this Court.

B. Petitioner has argued that an independent counsel exercising the full and final law enforcement authority of the Attorney General is a "superior" Officer who must, like the Attorney General, be appointed by the President with the advice and consent of the Senate. Because Attorney General Meese's regulation purports to allow the Attorney General to appoint such an Officer, petitioner asserts, it is unconstitutional. Only if the regulation is construed to vest ultimate control in the Attorney General or the President may it be deemed constitutional. Moreover, petitioner maintains, the notable absence of law in this vital area renders the issue appropriate for review by this Court.

Respondent counters that the independent counsel is an "inferior Officer" as long as the Attorney General retains some limited power to rescind the regulation under some undefined circumstances, and that his appointment by the Attorney General was therefore proper. He expends considerable effort asserting that an independent counsel need not be subordinate to, or removable at will by, any other Executive Officer in order to be an "inferior Officer," *see* Opp. to Pet. for Cert. at 15, and he in fact applauds the "safeguards of independence built into" the regulation, *id.* at 21 n.14, which, he states, "preclude[s]" "actual subservience to the Attorney General." *Id.*[3]

In notable contrast, the Solicitor General adopts the separate view of Judge Williams below and argues that

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[3] This, of course, is precisely petitioner's point. Any regulation that precludes "actual subservience," either through the chain of authority or at-will removability, cannot possibly create merely an "inferior Officer."

the independent counsel is an "inferior Officer" because the Attorney General retains full and unreviewable authority to rescind the regulation. (It is, of course, the panel majority's failure to construe the regulation along the lines now advanced by the Solicitor General, in order to render it constitutional, that forms the heart of petitioner's challenge to the decision below). *See* Brief for the United States as Amicus Curiae at 8-9. These different views of the merits of petitioner's argument do not, of course, render the issue presented inappropriate for review. To the contrary, they highlight the broad range of opinion on the proper interpretation both of the regulation at issue and of the term "inferior Officer" in the Appointments Clause and underscore the necessity for clarification by this Court.

In a curious effort to minimize the importance of the question presented, respondent suggests that petitioner seeks only an advisory opinion "on the scope of judicial review of a hypothetical revocation of the regulation . . . ." Opp. to Pet. for Cert. at 13 n.7. This is a gross mischaracterization, as the Brief for the United States makes clear. The nature and extent of the independent counsel's subservience to the Attorney General is crucial to the determination whether the independent counsel is an "inferior" or a "superior" Officer and therefore whether he is lawfully appointed. The *only* conceivable source of Executive control over the independent counsel is in the ability to revoke the regulation. If that ability is circumscribed, so, too, is Executive control over the independent counsel's exercise of Executive power. The issues of authority, independence and removability are inextricably intertwined, and respondent's effort to isolate one from the remainder is entirely misplaced.

3. Respondent merely quotes the analysis of the court of appeals to demonstrate that that court's ruling on 28 U.S.C. § 515 is correct—while omitting the caveat that the D.C. Circuit found the issue to be "less than perfectly clear." App. 15a. The court's analysis was seri-

ously flawed when set forth by the court of appeals and remains seriously flawed. Respondent offers no reason why the associate counsel and his office somehow are different from, and need not be treated like, any other special attorneys in the Department of Justice. He offers no reason why § 515 case law from other circuits is inapposite. And he offers no explanation for the far from "self-evident" proposition that an office established under the Attorney General's regulation within the Department of Justice is not "a new and different Office of Independent Counsel, separate and distinct from the Office that already was in existence under the [Ethics in Government Act.]" Opp. to Pet. for Cert. at 17.

Most notably, respondent fails to explain how the associate counsel can possibly be acting as Officers of the Department of Justice without ever receiving appointments or acknowledging their status as Officers of that Department.[4] The simple fact is that it makes a big difference—one glossed over by the court of appeals, respondent, and the Solicitor General—whether or not the associate counsel are Officers of the Department of Justice. Under the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591 *et .seq* ("Ethics Act"), associate counsel are independent of the Department of Justice and its regulations, including the conflict of interest laws covering Justice Department Officers. Under the Attorney General's regulation, however, associate counsel cannot be free from such re-

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[4] The Solicitor General errs when he states that under the regulation Mr. Walsh "appointed associates to assist him," and that the court of appeals "properly declined to invalidate the appointment of respondent's assistants under the Attorney General's regulations . . . ." Brief for the United States at 5, 11-12. The record is clear that there never were any appointments or acknowledgments of such. The court of appeals declined to require that there be appointments; it certainly did not decline to "invalidate" what never existed.

straints.[5] Section 515 resolves this issue in the routine case by requiring that special attorneys—even attorneys already employed by other agencies within the Executive Branch—have a written record of their assignment to and duties within the Department. Associate counsel have created no such record, have never acknowledged that they act as Officers of the Department, and cannot be said to be bound to those provisions.

4. The position advanced by the Solicitor General—that the Attorney General has full and unreviewable authority to revoke the regulation and thereby remove the independent counsel at will—highlights the applicability

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[5] Perhaps for this reason, the independent counsel has maintained that he and his staff are *outside* the Department of Justice even under the regulation. *See* App. 12a n.31.

The Department of Justice, in contrast, long has maintained that not only the regulation but also the Ethics Act places associate counsel *within* the Department, rendering them subject to the conflict of interest provisions. For that reason, the Department might not have felt concerned at the failure of associate counsel to acknowledge those same duties twice, by taking a second oath to an office within the Department of Justice. The Department has now been proved wrong, however. The new independent counsel statute, signed into law on December 15, 1987, makes clear that, effective immediately, no associate counsel, including those in ongoing investigations, may be deemed Officers of the Department under the Ethics Act for purposes of the statutory conflict of interest provisions. *See* Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191 (text available in H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. (1987)). As a result, under no possible interpretation of the appointment affidavits and oaths sworn under the Ethics Act may it be claimed that associate counsel operate in the same capacity under the Ethics Act and under the Attorney General's regulation, or that they ever have taken oaths to an office within the Department of Justice.

In light of the new Act, should the Court decide not to grant certiorari on the lawfulness of the Attorney General's regulation, it would appear appropriate for the case to be remanded for reconsideration in light of the amendments to the Act, which resolve a controversy over the relationship between the comparative duties and obligations of the associate counsel under the two sources of authority.

of *Bowsher* v. *Synar*, 106 S.Ct. 3181 (1986) to this case. Under the Ethics Act, the independent counsel is insulated from control by the Attorney General by the provision allowing a court to review any removal decision, presumably *de novo* and to reinstate the independent counsel over the objection of the Attorney General. 28 U.S.C. § 596(a)(3) (App. 97a). For all intents and purposes, that review provision requires that the Attorney General apply for and receive permission from the Judicial Branch before discharging the independent counsel. By placing the ultimate decision with the court, that provision removes any subservience of the independent counsel to the Attorney General and renders the independent counsel's relationship to the court the only one that matters.

In contrast, the Attorney General's regulation (as construed by petitioner and the Solicitor General) renders the Attorney General fully accountable for the activities of the independent counsel to the extent it gives him full and unreviewable authority to terminate the independent counsel's office; this authority to remove at will overrides the more limited removal provisions of the regulation and essentially renders them a sham. As long as the Ethics Act remains in force, however, the ability of the Attorney General to control is illusory. If a court retains essentially unfettered power to reinstate the independent counsel, the Attorney General's action is meaningless, and he is rendered impotent.

The hypothetical advanced by the Solicitor General (at 13-14) proves the point. Suppose, as the Solicitor General suggests, a court takes a United States Attorney, who is accountable to and removable at will by the Attorney General, and appoints him to be independent counsel and to continue his investigations in that capacity. Thereafter, any effort by the Attorney General to exercise control may be countermanded by the court. The result is to free an Officer from the line of authority in which he normally operates and to render him beholden

only to a court. The purpose and effect of such an appointment would be the same—to sever any and all allegiance to the Department of Justice and to replace it with the protection of the judiciary. An Ethics Act appointment has just that purpose and effect.

Finally, the distinction between this case and *Bowsher* advanced by the Solicitor General—between the power to remove and the power to reinstate (at page 12)—is not one that makes any substantive difference at all. In this case, as in *Bowsher*, the branch of government responsible for executing the laws is deprived of control over that function. In *Bowsher*, Congress allowed the Executive to appoint its own Officer but retained the removal power for itself. Here, Congress has removed from the Executive the power to appoint and has given the judiciary the power to second-guess any removal decision. One would surely have thought that the Executive would balk, on separation of powers grounds, if Congress were to authorize a court to review *de novo* a decision to remove the Secretary of State, or a foreign ambassador, and to reinstate either of them at will over the objection of the Executive. Yet the difference between that case and this one, if there is one, is not readily apparent.

CONCLUSION

For these reasons and the reasons stated in the petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
TERRENCE O'DONNELL
NICOLE K. SELIGMAN
WILLIAMS & CONNOLLY
839 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Petitioner